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Argument

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ADRIANA AGUILAR, et al,

4 Plaintiffs,

5 v.

07 CV 8224 (JGK)

6 BUREAU OF IMMIGRATION AND
7 CUSTOMS ENFORCEMENT,

8 Defendant.

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9 New York, N.Y.
10 October 9, 2007
4:30 p.m.

11 Before:

12 HON. JOHN G. KOELTL,

13 District Judge

14 APPEARANCES

15 DEWEY & LeBOEUF
16 Attorneys for Plaintiff
17 PATRICK J. GENNARDO
DONNA L. GORDON

18 PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
19 Attorneys for Plaintiff
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20 UNITED STATES DEPARTMENT OF JUSTICE
21 Attorneys for Defendant
22 ELIZABETH WOLSTEIN
SHANE CARGO
23 PATRICIA BUCHANAN
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7a9nagun

Argument

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(Case called)

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MR. GENNARDO: Good afternoon, your Honor. My name is Patrick Gennardo. I'm a member of the firm of Dewey & LeBoeuf. I have with me my partner and cocounsel Donna Gordon, my cocounsel, Foster Maer, and Ghita Schwarz and Jackson Chin from the Puerto Rican Legal Defense and Education Fund.

THE COURT: Good afternoon.

MS. WOLSTEIN: Elizabeth Wolstein from the U.S. Attorney's Office on behalf of the defendants, and with me my colleagues Shane Cargo and Patricia Buchanan from the U.S. Attorney's Office.

THE COURT: All right. Good afternoon.

I should point out -- I may have done this at the last conference -- I am sure I know people at Dewey & LeBoeuf. My deputy knows at least someone at LeBoeuf. I know people at the U.S. Attorney's Office. There's nothing about any of that that affects anything I do in the case.

I don't believe that I know any of the individual lawyers who are appearing here.

This is an application for a TRO. I should point out I received the government's letter by fax. I received the plaintiffs' brief, also by fax, and a copy of the brief was delivered to chambers.

There's a reference to a reply declaration by Gordon.

7a9nagun

Argument

1 I don't have that reply declaration. So if you want to pass up
2 a copy of the reply declaration --

3 MR. GENNARDO: I believe I have one, your Honor. I'm
4 sorry about that confusion. You were actually supposed to get
5 a copy of the reply declaration by hand, not a copy of the
6 brief.

7 THE COURT: I think I got two copies of the brief, one
8 by fax and one delivered.

9 MR. GENNARDO: OK.

10 THE COURT: I take it that the Gordon declaration has
11 also been given to the government.

12 MS. WOLSTEIN: No, your Honor. We have not been
13 served with that declaration or with the exhibits.

14 MR. GENNARDO: Your Honor, we sent out a courier this
15 morning with a copy of the declaration to both yourself and to
16 Ms. Wolstein, understanding that we would not be able to send
17 such a long document by fax.

18 THE COURT: Something must have happened.

19 MR. GENNARDO: Something happened along the way.

20 THE COURT: The same thing must have happened to the
21 government's copy as happened to our copy, I assume.

22 MR. GENNARDO: May I?

23 THE COURT: It is always possible that things get
24 lost.

25 MR. GENNARDO: Your Honor, we will have a copy brought

7a9nagun

Argument

1 up right away.

2 THE COURT: OK.

3 MR. GENNARDO: I can tell you, your Honor, what was
4 attached to the declarations.

5 THE COURT: Sure.

6 MR. GENNARDO: It is primarily two things. It's
7 affirmations from each of the adult plaintiffs serving as named
8 plaintiffs in this matter as well as some photographs of the
9 plaintiffs' homes which we believe show that the entry and
10 searches conducted of the plaintiffs' homes was not consensual
11 in any sense: Pictures of broken doorframes, kicked-in doors,
12 boot marks on doors, things of that nature. We will get that
13 to you expeditiously. I do apologize for the confusion and to
14 the government, of course.

15 THE COURT: OK.

16 MR. GENNARDO: I'm sorry. One other item, your Honor,
17 I forgot.

18 We also included a declaration from Mrs. Peggy De La
19 Rosa. She was a victim of a nonconsensual ICE raid just last
20 week. She lives in Huntington Station, New York. This was the
21 second time that ICE returned to her home purportedly in
22 pursuit of a fugitive alien named Miguel. Miguel has never
23 resided with Ms. De La Rosa. The government was there about 13
24 months ago, did a nonconsensual entry and search of her home
25 and then returned to do it again just this past week. So we've

7a9nagun

Argument

1 included a declaration from her as well.

2 THE COURT: OK. She's the only plaintiff who has been
3 revisited?

4 MR. GENNARDO: She's actually not a named plaintiff
5 yet, your Honor.

6 THE COURT: OK.

7 MR. GENNARDO: May I?

8 THE COURT: It is your application.

9 MR. GENNARDO: First of all, your Honor, thank you
10 very much for hearing us on an expedited basis. We appreciate
11 your hearing us both on Friday and again this afternoon.

12 Your Honor, our clients desperately need your help.
13 They have no place else to turn. I don't know how to say that
14 in any other way. Fourth Amendment rights of a Latino
15 community in the lower New York State area are systematically
16 being violated by the Immigration and Customs Enforcement
17 Division of the Department of Homeland Security, more commonly
18 known as ICE. The fact that these violations are occurring is
19 beyond any real dispute.

20 In our complaint we have 27 plaintiffs from nine
21 separate incidents ranging in three separate counties in lower
22 New York State. All of the complaints alleged by these
23 plaintiffs are very similar in the tactics that ICE has used to
24 gain entry to their homes, unlawfully search their homes, and
25 detain the plaintiffs.

7a9nagun

Argument

1 We also have declarations from each of the adult
2 plaintiffs in our complaint verifying the allegations in the
3 complaint. We obtained those, your Honor, based on some of
4 your comments at our last hearing and concerns that the
5 complaint was not verified.

6 We now have pictures attached as Exhibit G to the
7 Gordon declaration which we will have for you shortly, which
8 show that the entries to plaintiffs' homes were far from
9 consensual.

10 As I noted earlier, the pictures show broken door
11 frames; they show kicked-in doorways; they show boot marks on
12 doors.

13 These are not the hallmarks of a consensual entry or
14 search. These are hallmarks of forcible entries and searches.
15 As the government conceded last time we were here at a hearing
16 on Friday, the government does was operating under judicially
17 ordered search warrants or judicially order arrest warrants;
18 that the program under which the government is operating is
19 purely a consensual program.

20 We have also brought to your attention, your Honor,
21 that there are numerous other complaints pending around the
22 country making very similar allegations about ICE's misconduct
23 as raised in plaintiffs' complaint in this matter. We have
24 also provided your Honor with numerous articles, again,
25 recounting stories from all over the country --

7a9nagun

Argument

1 THE COURT: Is there any case law from any other court
2 granting or denying motions for a TRO or preliminary
3 injunction?

4 MR. GENNARDO: I believe there was one matter in which
5 the Court denied a TRO. That was in Minnesota, your Honor.
6 The allegations of that complaint were a little different than
7 the allegations in our complaint. In that case the plaintiffs
8 actually sought to intervene into the workings of the
9 Department of Homeland Security and effectuate stays of the
10 prosecution of some of the named plaintiffs who were detained
11 by ICE. We have not sought to do that in this matter.

12 As I was saying, the articles, again, if you read
13 them, you will see that the allegations made by other victims
14 of ICE's nonconsensual searches very much parrot the types of
15 allegations that we raised in our complaint.

16 Perhaps most tellingly, we've provided your Honor with
17 copies of letters that were written by the Nassau County Police
18 Commissioner and the Nassau County Executive publicly
19 complaining to ICE officials about the manner in which ICE
20 conducted home raids just last week or ten days ago in Nassau
21 County. In those letters Executive Suozzi very pointedly said
22 to the Department of Homeland Security that the raids that were
23 conducted were characterized by malfeasance.

24 THE COURT: Those raids appear to be from the letter
25 somewhat different from the allegations in the complaint,

7a9nagun

Argument

1 because the letters from Nassau indicate that there were arrest
2 warrants and also indicated that there were persons who were
3 detained who were in fact eligible for detention because they
4 were here illegally, unlike the plaintiffs in this case.

5 MR. GENNARDO: May I address that, your Honor?

6 THE COURT: Sure.

7 MR. GENNARDO: Actually, some of the victims of that
8 raid are plaintiffs in our case. In fact, when the agents came
9 to some of our plaintiffs' homes, they were seeking specific
10 individuals. Those individuals did not live in the homes of
11 the various named plaintiffs.

12 In Nassau County, if you read the letters, actually
13 the allegations are very similar to the allegations in our
14 complaint. In those letters, the police commissioner makes
15 very clear that very few of the people detained by the
16 government in those raids had arrest warrants issued for them.
17 The overwhelming majority of the individuals arrested in those
18 raids were undocumented aliens.

19 So it's very much in line with the allegations of our
20 complaint in which we allege that the government is using
21 administratively issued arrest warrants, not judicially issued
22 arrest warrants, and with those warrants and with poor due
23 diligence and poor background information, they are approaching
24 plaintiffs' homes.

25 THE COURT: But none of the plaintiffs in this case

7a9nagun

Argument

1 are undocumented aliens.

2 MR. GENNARDO: That's not correct.

3 Some of them are.

4 Getting back to the Nassau County letters, in those
5 letters, the police commissioner and Executive Suozzi make very
6 clear that the raids that are being conducted by ICE are being
7 conducted with a cowboy mentality and I quote Commissioner
8 Mulvey's letter that the raid that they witnessed, independent
9 third-party governmental entities, were characterized by
10 malfeasance and illegality.

11 The confluence of all these facts shows a clear
12 pattern and practice on the part of ICE to engage in unlawful
13 and illegal entries, searches and seizures, not only here in
14 lower New York State, but all over the country.

15 There's no other way to explain the frequency and the
16 similarity of the allegations that are coming up not only here
17 in lower New York State but all over the country.

18 The fact that the violations are continuing and that
19 plaintiffs are at daily risk of violation is also beyond any
20 real dispute. ICE conducted raids in Queens only four days
21 ago. They conducted raids in Nassau County ten days ago. The
22 Nassau County police chief letter, the very last paragraph of
23 that letter unequivocally attests to the fact that future raids
24 are planned in Nassau County by ICE.

25 ICE agents have threatened our plaintiffs that they

7a9nagun

Argument

1 are in fact going to return. The De La Rosa declaration shows
2 that ICE agents do return. In fact, having been raided by ICE
3 once puts you at even greater risk of a second ICE unlawful
4 entry because ICE's database and information gathering is so
5 poor that, once you end up on that database, you are at greater
6 risk of once again being identified by ICE as a potential
7 target for home raid.

8 That's clearly what happened to Mrs. De La Rosa. If
9 you take a look at the independent inspector general's report,
10 ICE's own inspector general, you will see that the inspector
11 general criticizes ICE's own investigative techniques, ICE's
12 own information gathering and ICE's maintenance of an
13 up-to-date database..

14 The Nassau County letters also show that ICE was very
15 poorly prepared for the raids that they engaged in, that their
16 Intel was not up to date, and that something like 8 of the 98
17 arrest warrants that ICE had that evening or in the course of
18 those two days had incorrect addresses on them.

19 The other set of our plaintiffs who have a continuing
20 harm here are what we call our Deshawn plaintiffs. These are
21 plaintiffs who were arrested as undocumented aliens. They are
22 now currently subject to immigration proceedings by DHS, and
23 the only reason that they are in these proceedings and subject
24 to the future damages is because of ICE's illegal activities in
25 entering their homes and illegally seizing them once inside

7a9nagun

Argument

1 their homes.

2 Before we dig into the substance -- yes, your Honor.

3 THE COURT: Deshawn was a case where the Court was
4 talking about evidence that was allegedly illegally obtained
5 and was then used in a proceeding. If in fact the initial
6 detention was unlawful, does that mean any further detention
7 cannot be accomplished?

8 MR. GENNARDO: Your Honor, with all due respect, I
9 think that gets a little bit beyond the allegations that we're
10 comfortable making in this matter. I think in each of the
11 individual plaintiffs' deportation proceedings they do have the
12 right to raise that they were seized illegally and their homes
13 were searched in violation of the Fourth Amendment.

14 Our case is postured a little bit differently. What
15 we're purely challenging here is the unconstitutional conduct
16 by ICE in entering the homes. We're seeking an injunction to
17 stop ICE from violating Latinos' constitutional rights.

18 THE COURT: In Deshawn, the basis for standing was in
19 fact the threat of the continuing use of the evidence allegedly
20 illegally seized. You say that's not what we're arguing about
21 here.

22 MR. GENNARDO: No.

23 THE COURT: So --

24 MR. GENNARDO: We read Deshawn along with your Honor,
25 but also a little bit differently.

7a9nagun

Argument

1 What we read Deshawn to say is that when the
2 government improperly obtains some fruit that it can use later
3 on to cause future harm to the plaintiffs, that Deshawn kicks
4 in to provide standing to enjoin the government from acting.

5 But Deshawn also very clearly says that when the
6 government is acting under an illegal pattern or practice or
7 policy or something akin thereto, and the group to which that
8 illegal activity is targeted can be identified, that in fact
9 there is injunctive relief standing.

10 There are numerous cases that stand for that position,
11 including Shane. Before we dive into the substantive
12 allegations, I wanted to address some of the your Honor's
13 comments from last week about the perhaps unusual posture of
14 our motion. When we filed our complaint in September, we were
15 not aware of any raids postdating the spring of 2007.

16 Being ever vigilant of the legal standards involved
17 for an exigent motion and respectful of the Court's and the
18 government's time, we determined at that point not to seek a
19 TRO. Instead we determined that what we would do is seek
20 expedited discovery and promptly bring on a motion for a
21 preliminary injunction.

22 Literally on the eve of making our motion for
23 expedited discovery, two intervening factors occurred:

24 First, the raids started again, except this time they
25 were much more brutal and aggressive than the raids we had been

7a9nagun

Argument

1 told about before. We felt we had no choice, but at that
2 moment in time, particularly knowing that future raids were
3 being scheduled by ICE in Nassau County, that we had to move
4 for expedited relief before your Honor.

5 The second thing that happened is my son was born and
6 I had to travel out of state to California to get him. So we
7 were in the process of trying to amend our complaint, bring on
8 the motion for a TRO, prepare our declarations and get
9 information, and doing all of that from about 2500 miles away.

10 This is just a short way of trying to assure your
11 Honor that, while the posture of the motion might be somewhat
12 unusual and not typical of the TRO motion that your Honor has
13 seen before, that we have moved very cautiously and carefully
14 in bringing the instant motions and that we are certainly
15 prepared to bring our preliminary injunction motion promptly,
16 certainly within the 10 to 20 days provided by Rule 65,
17 provided the government is able to provide us with the
18 discovery that we believe we deserve and need to bring that
19 motion on.

20 I would like to address the standing issues if your
21 Honor would like to hear us on those.

22 THE COURT: Sure.

23 MR. GENNARDO: Then Ms. Gordon and Mr. Foster will
24 address some of the other issues raised by the government in
25 their opposition brief.

7a9nagun

Argument

1 Under Lyons and Shane it's clear that where a policy
2 or the equivalent of a policy of unconstitutional conduct by
3 the government is aimed at a particular group and the threat of
4 harm is imminent to that particular group, that injunctive
5 relief standing exists.

6 I believe that we've alleged certainly as best as we
7 can under the haste of bringing a TRO motion that, one, in
8 fact, there must be some sort of practice if not a policy on
9 the part of the government targeting Latinos in lower New York
10 State.

11 As I noted earlier, there's simply no other
12 explanation for the confluence of all of the information that
13 we've been able to gather not only from within lower New York
14 State but also across the country.

15 There's no way plaintiffs can be suffering the same
16 kind of constitutional deprivations, the stories can be the
17 same over and over again, unless ICE is consciously engaging in
18 these activities.

19 The fact that there's been a threat I think is also
20 abundantly clear both from the fact that the raids are
21 occurring, that raids are planned in the future, that there
22 have been threats against our plaintiffs for future raids, and,
23 then, of course we have the Deshawn plaintiffs against whom the
24 government's continuing to bring claims and continuing to
25 prosecute based on the government's illegal conduct in entering

7a9nagun

Argument

1 their homes and seizing the plaintiffs.

2 The allegations in our complaint are found in
3 paragraphs 321 through 328 and 332.

4 Another factor that the government argued I believe
5 last week and argued in their papers is that we're somehow
6 seeking a mandatory injunction, and therefore, the standard for
7 receiving an injunction should be viewed at a higher level.

8 That's simply a mischaracterization of the relief we
9 sought here, your Honor. The fact that we have provided the
10 government or sought to provide the government with an out or
11 release from the prohibition on conducting warrantless home
12 raids does not rise to the level of changing government policy
13 or affirmatively requiring the government to get judicial
14 warrants when it conducts raids.

15 Our requested relief in the TRO is purely seeking to
16 maintain the status quo, to prevent further irreparable injury
17 to our clients, and to preserve the integrity of this process
18 so that we are able to continue to access our witnesses and not
19 have our named plaintiffs removed from the jurisdiction.

20 THE COURT: But the request for a TRO does request
21 that ICE be prohibited from entering or searching any home
22 without first obtaining a judicially ordered search warrant.
23 That would change the law, which allows a consent search.

24 MR. GENNARDO: But it does not mandate a change in the
25 sense that it mandates ICE to go and get search warrants. ICE

7a9nagun

Argument

1 does not have to conduct home raids.

2 THE COURT: So it would change the availability of a
3 constitutionally authorized search on consent. ICE would be
4 told, you cannot conduct a constitutionally authorized search
5 on consent.

6 MR. GENNARDO: That's correct, your Honor.

7 THE COURT: It changes the law.

8 MR. GENNARDO: But there's no other way to protect our
9 clients' constitutional rights. ICE has demonstrated time and
10 time again, not only against our 27 plaintiffs, but all across
11 the country, that whatever rules, whatever policies, whatever
12 procedures they're operating under are not correctly geared to
13 abide by the constitutional rights of the homes and the
14 individuals in the homes to which they're targeting.

15 That is the only way that our clients can be assured
16 that they are not going to continue to suffer the irreparable
17 harm that is being handed to them now by ICE. It is not
18 unusual in the sense when a governmental entity is engaging in
19 an illegal practice of conduct geared to a particular community
20 for a court to enter a TRO or permanent injunction enjoining
21 the government to abide by the Constitution.

22 THE COURT: This goes further than that, because it
23 would prohibit the government even from conducting otherwise
24 constitutional searches.

25 MR. GENNARDO: But it would not prevent the government

7a9nagun

Argument

1 from doing those searches at all. It certainly provides the
2 opportunity, with due deference to the important mission that
3 ICE has, it provides ICE with the opportunity to do home
4 searches when they can justify that the home searches are
5 warranted by the facts of the individual case.

6 We did not try to draw that prohibition in a way to
7 hamstring ICE or prevent ICE from conducting what would
8 otherwise be valid home searches and valid home entries, but
9 ICE has shown that it does not have the ability to make
10 judgments about what a valid and invalid home search is at this
11 point.

12 I don't know. I can't think of any other way to
13 protect our clients from the recurring irreparable harm that
14 they are now being faced with by ICE every day as these raids
15 continue, as plans for raids continue, as ICE continues in its
16 conduct in the face of our complaint, painstakingly setting out
17 the allegations of misconduct in the face of the other
18 complaints around the country, in the face of the letters from
19 the Nassau County Executive and the Nassau County police
20 commissioner.

21 The two raids that occurred most recently happened
22 after the filing of our complaint, and certainly the second
23 raid occurred after the public letters by Nassau County to
24 high-ranking ICE officials.

25 I don't know how else, your Honor, we protect the

7a9nagun

Argument

1 constitutional rights of our clients, the irreparably damaged
2 rights, once ICE does continue to conduct these raids.

3 THE COURT: The issue for purposes of a temporary
4 restraining order would be -- and you can correct me if I'm
5 wrong -- whether there is a likelihood of immediate and
6 irreparable injury to the plaintiffs in the ten days for which
7 the temporary restraining order by rule could continue to
8 exist.

9 MR. GENNARDO: I do not disagree with that, your
10 Honor.

11 THE COURT: What would the showing be that it is
12 likely that the plaintiffs who are before me will have an
13 illegal raid conducted against them in the next ten days?

14 MR. GENNARDO: Again, your Honor, the fact that ICE is
15 continuing with its raids unabated in lower New York State,
16 that it is targeting Latinos for these raids -- all of our
17 clients are Latinos.

18 THE COURT: Yes.

19 Even those plaintiffs who were subject to search going
20 back to February through April of 2007, no plaintiff has been
21 revisited in the months and months since then, and you ask me
22 to find that it is likely that they will suffer another search,
23 even though they haven't suffered another search for months and
24 months, that these plaintiffs will have another search which
25 would be Elavil in the next ten days.

7a9nagun

Argument

1 MR. GENNARDO: Yes, your Honor.

2 We need to be a bit careful. Because Lyons certainly
3 does not require, and it's certainly not the case law that I've
4 read, that plaintiffs actually have suffered two deprivations
5 of their constitutional rights before they can make a showing
6 that they're likely to suffer an additional deprivation at the
7 hands of the government.

8 What we have alleged here is that our clients are
9 members of a targeted community in an identifiable area, that
10 ICE is conducting raids as recently as four days ago and that
11 there are plans to conduct additional raids. Our plaintiffs
12 are certainly within the group of individuals that ICE is
13 targeting for unconstitutional home entries, seizures and
14 detention.

15 There is a strong likelihood that any of our named
16 plaintiffs, including any member of the putative class, could
17 have a home entry by ICE. It could be happening right now as
18 we're sitting here. There's no way that any of us can say that
19 any of our named plaintiffs is unlikely to suffer that harm.
20 They are within the group that ICE is targeting for home raids.

21 THE COURT: But the showing is really not whether it
22 can be said to be unlikely, but whether there is a showing of
23 likelihood of irreparable injury that is not hypothetical or
24 speculative, but a sufficient showing of immediate and
25 irreparable injury to warrant a temporary restraining order.

7a9nagun

Argument

1 The temporary restraining order is itself somewhat --
2 well, it's different from either a preliminary injunction or a
3 permanent injunction because it exists for ten days, and it is
4 extraordinary relief.

5 MR. GENNARDO: Yes, it is, your Honor. The harms that
6 are occurring are extraordinary here, not only extraordinary in
7 the fact that they're deprivations of very basic constitutional
8 rights, but the manner in which these raids are being executed
9 is brutal.

10 We have clients who have had guns pulled on them,
11 completely innocent people asleep in their home having their
12 doors kicked in and guns put in their chest in the middle of
13 the night.

14 If you read the Nassau county police commissioner's
15 letter, in there he notes that what ICE is doing is of grave
16 danger to not only his officers but to all of the parties
17 involved.

18 This is a very grave issue. This is not a light
19 issue. Certainly it rises to the level of the type of
20 important and special relief that we are seeking here. If I
21 can just get back to the standards that your Honor raised about
22 the TRO, certainly, I don't think there can be any doubt that
23 irreparable injury is being suffered, has been suffered, and
24 that our clients are at risk of suffering irreparable injury.

25 It's pretty clear under the case law that violations

7a9nagun

Argument

1 of Fourth Amendment rights are irreparable injuries. Our
2 clients have a right to be secure that in the next ten days,
3 the next 20 days, the next 20 years, that the government is not
4 going to kick in their door, seize their families in the middle
5 of the night, particularly when they have absolutely no
6 relationship to anything that ICE is doing or any person that
7 ICE is pursuing.

8 Those are important rights. Those are important
9 security rights given to each of us by the Constitution. The
10 fact that our plaintiffs are likely to be within the ambit of
11 individuals who might have that happen to them I think is
12 pretty clear from the fact that ICE is continuing to do the
13 raids, that ICE has plans to do more raids, and they have
14 threatened to come back to some of our plaintiffs' homes, and
15 in fact they have come back to some plaintiffs -- not
16 plaintiffs but to some of their victims' homes. We have the
17 affidavit from Mrs. De La Rosa to prove that.

18 I think, your Honor, the facts here are very different
19 from Lyons and Shane, where the court there properly found that
20 the distance between the harm that had been suffered by Shane
21 and by Mr. Lyons was very remote.

22 Those individuals were not within a targeted class of
23 individuals or illegal government activity. They were not
24 within the group targeted. It was not in Lyons, for example,
25 in a policy of the Los Angeles police to conduct chokeholds.

7a9nagun

Argument

1 In this situation it's very different.

2 We have a group that is being targeted. We have a
3 pattern and practice, if not policy, of violating that targeted
4 group's rights, and we have evidence that that type of activity
5 and those types of raids are planned for the future and our
6 clients have been threatened with that type of activity in the
7 future.

8 This is not like Lyons, where the individual would
9 have to just happen to have to be stopped by the police and
10 that the police officer who stopped them might just use his
11 discretion to use a chokehold that was not sanctioned by the
12 government.

13 This is a case where our clients are within the group
14 being targeted by the government for constitutional
15 deprivations. That group is identifiable both by race and by
16 location. There's no doubt, the police chief's letter makes
17 clear there will be more raids. Unless the government is
18 stopped, there will be more irreparable injury suffered by our
19 clients and members of the putative class.

20 That is very different from Lyons. That is very
21 different from Shane.

22 The notion that Shane, a lawyer, might be arrested
23 again in the future and strip searched when he had no prior
24 record, when the proceedings the underlying marital proceedings
25 which gave rise to his initial arrest had been resolved, sure I

7a9nagun

Argument

1 think we can all sit here and say that it's not likely that
2 Shane is going to be arrested and strip searched again.

3 I think it is fair to say that Lyons was not likely to
4 be one of the millions of people traveling on the California
5 roads and arrested again and put in a chokehold. I don't think
6 we can say the same thing about the plaintiffs in this matter.
7 It is very different.

8 THE COURT: All right.

9 MR. GENNARDO: OK. Diane, would you like to address
10 some of the other contentions by the government?

11 MS. GORDON: Good afternoon, your Honor.

12 THE COURT: Good afternoon.

13 MS. GORDON: I would like to address defendants
14 allegations that plaintiffs' TRO application is prohibited by
15 the Real ID Act by 8 U.S.C.A. 1252(g) and by 8 U.S.C.A.
16 1252(f).

17 Defendants use the Real ID Act to challenge the second
18 prong of plaintiff's TRO. Defendants mischaracterized the
19 nature of this action and the relief sought in this application
20 for a restraining order to argue that the Real ID Act divests
21 this court of jurisdiction. 8 U.S.C.A. 1252(b)(9) sets forth
22 or allows judicial review of all questions of law and fact
23 arising from any action taken or proceeding brought to remove
24 an alien. Let me just clarify, your Honor. It prohibits
25 judicial review.

7a9nagun

Argument

1 In conjunction with (b)(9), we also have 8 U.S.C.A.
2 1252(g). The two statutes are very similar in that they are
3 mint to prevent an alien from challenging the removal
4 proceedings that have been decided.

5 In this case, the plaintiffs' case does not involve
6 removal proceedings. The plaintiffs do not challenge any
7 deportability charges or seek to review any actions or
8 proceedings to remove an alien. Our case does not arise out of
9 removal proceedings, which is the aim of the Real ID Act.

10 Plaintiffs do not seek to interfere in the removal
11 process or to stay removal orders with an intention to prolong
12 any defendant's presence in the United States.

13 What we want is to maintain the integrity of the
14 judicial process by having the Court temporarily restrain
15 defendants from tampering with individuals that are integral to
16 the prosecution of this action.

17 All of the cases cited by the defendant in support of
18 its arguments relating to the Real ID Act or 8 U.S.C.A. 1252(g)
19 deal with someone who is trying to stay in the country and get
20 around deportation. That is not the target of the instant
21 case.

22 8 U.S.C.A. 1252(g) is a statute that states that no
23 court shall have jurisdiction to hear any cause or claim by or
24 on behalf of any alien arising from the decision or action by
25 the attorney general to commence proceedings, adjudicate cases,

7a9nagun

Argument

1 or execute removal orders against the aliens.

2 Those are the three actions at 1252(g) is aimed at.

3 The instant case does not deal with the attorney
4 general's decision to commence proceedings, adjudicate cases,
5 or execute removal orders. Therefore, it is inapplicable to
6 the instant matter.

7 THE COURT: Wouldn't the second part of the TRO in
8 fact prevent the removal of a person otherwise subject to an
9 order of removal?

10 MS. GORDON: You're referring to the reference to
11 deporting?

12 THE COURT: Right.

13 MS. GORDON: We do recognize that, your Honor, but we
14 believe that what the statute is meant to prohibit is people
15 who are trying to get around their deportation findings.

16 In this case, we're simply trying to ensure the
17 integrity of the judicial process so that we will have
18 availability to our witnesses. We are simply talking about
19 something, some sort of temporary restraint --

20 THE COURT: Wouldn't it on its face prevent the
21 execution of an order of removal against a person otherwise
22 subject to an order of removal?

23 MS. GORDON: It could, your Honor. If that proved to
24 be a problem, we would be willing to strike that from the
25 paragraph of the temporary restraint.

7a9nagun

Argument

1 THE COURT: Go ahead.

2 MS. GORDON: The claims at issue here arise out of a
3 pattern and practice, if not a policy, of ICE to conduct
4 unconstitutional home raids.

5 Home raids do not qualify as a proceeding, an
6 adjudication, or an execution of removal in any form under the
7 statutory language. The unconstitutional violations are wholly
8 independent of any immigration proceeding the plaintiffs or
9 class members may be subject to now or in the future.

10 The relief requested to address this common grievance
11 would not alter the course of proceedings against an alien in
12 any individual immigration case.

13 The two cases that I would cite to your Honor are 490
14 F.3d 143 Iqbal v. Hasty, and Arar v. Ashcroft, 414 F.Supp.2d
15 250. In both of these cases, plaintiffs claims were separate
16 from any underlying removal action, although they could be
17 considered to be closely related to the removal proceedings.

18 Our case differs because those cases relied on by the
19 defendant sought a stay of removal in order to facilitate an
20 ultimate goal of reversing the removal or obtaining alternative
21 relief. That is not the case in the instant matter.

22 With regard to the last provision of the TRO, the
23 defendants seek to prohibit that provision based on 8 U.S.C.
24 1252(f). This provision of the TRO simply is a notice
25 provision, your Honor. All we are asking is that the

7a9nagun

Argument

1 defendants notify the plaintiffs when they seek to transfer an
2 alien who has been detained and who may be a witness in our
3 case prior to transferring them or prior to transferring them
4 to outside of the New York State area.

5 We believe that all of the TRO provisions are not
6 prohibited by the statute set forth by the defendant and ask
7 that the Court grant the TRO in our favor.

8 THE COURT: Thank you.

9 MR. GENNARDO: Foster, did you want to address
10 expedited relief, expedited discovery?

11 MR. MAER: Good afternoon, your Honor.

12 THE COURT: Good afternoon.

13 MR. MAER: You asked the question before about legal
14 challenges and had there been preliminary injunctions issued.

15 We cite to two cases in our memo of law where
16 preliminary injunctions were issued, one of which is Illinois
17 Migrant Council V. Pillioid. That is 540 F.2d 1062. Then also
18 Leduc v. Nelson, 562 F.2d 1318.

19 Typically a lot of these cases that are brought about
20 raids are for damages. Few have sought --

21 THE COURT: Were those cases involving preliminary
22 injunctions against ICE?

23 MR. MAER: As I recall, yes.

24 THE COURT: Where were they issued? What were the
25 circumstances?

7a9nagun

Argument

1 MR. MAER: The Illinois Migrant Council case, it's the
2 Seventh Circuit 1976 if I recall correctly, there was sort of
3 an all-encompassing raid of a migrant community connected with
4 some sort of employment or the nature of the employment,
5 agricultural area, and a number of homes were invaded in that
6 instance. Leduc v. Nelson -- let me check on that, your Honor.
7 I am not certain. That was a 1985 case, Ninth Circuit.

8 THE COURT: All right.

9 MR. MAER: Again, a lot of these cases where these
10 actions do occur --

11 LeDuc is Washington state. I think I have the cite
12 there.

13 -- seek damages and very few have sought preliminary
14 injunctive relief. So that's one reason there's not a lot of
15 these cases.

16 In the instant situation in the last year or two, as
17 our papers make clear, this practice of home raids, there has
18 been a tremendous increase in the use of these raids. Prior to
19 2006, there just weren't many home raids. It's really part of
20 this Operation Return to Sender that home raids have been
21 utilized and hence produced this large number of home raids and
22 the actions that we're complaining of.

23 Lastly, there is a tremendous amount of fear in the
24 Latino community to stand up and publicly challenge these
25 raids. People, their family members, friends, people they live

7a9nagun

Argument

1 with, may have issues that involve their immigration status, so
2 there's a huge reluctance to step forward and bring these
3 challenges.

4 THE COURT: But that argument was raised last time,
5 and it's obviously an important issue. I asked for the
6 government's representation about the plaintiffs in this case
7 so that the government would give assurances that there would
8 be no retaliation against the plaintiffs in this case, and the
9 government gave those assurances with respect to the named
10 plaintiffs in this case, though they could make no assurance
11 with respect to John Doe plaintiffs.

12 MR. MAER: Correct.

13 THE COURT: That would be in keeping plainly with the
14 government's prior representations with respect to people who
15 are in litigation, representations that they make to the Court
16 of Appeals with respect to not removing people who are subject
17 to the litigation process because the government would not want
18 to tell the Court of Appeals that it was attempting to moot the
19 process.

20 The government gave those assurances with respect to
21 the named plaintiffs in this case, which would also tend to
22 undercut whether a temporary restraining order is necessary to
23 give such assurance for the plaintiffs in this case that their
24 case will be litigated without retaliation.

25 Wouldn't it also be unusual if you have named